

No. 22691.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FEB 24 1969

E. ARTHUR BARROWS, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court
for the Central District of California.

PETITION FOR REHEARING

FILED

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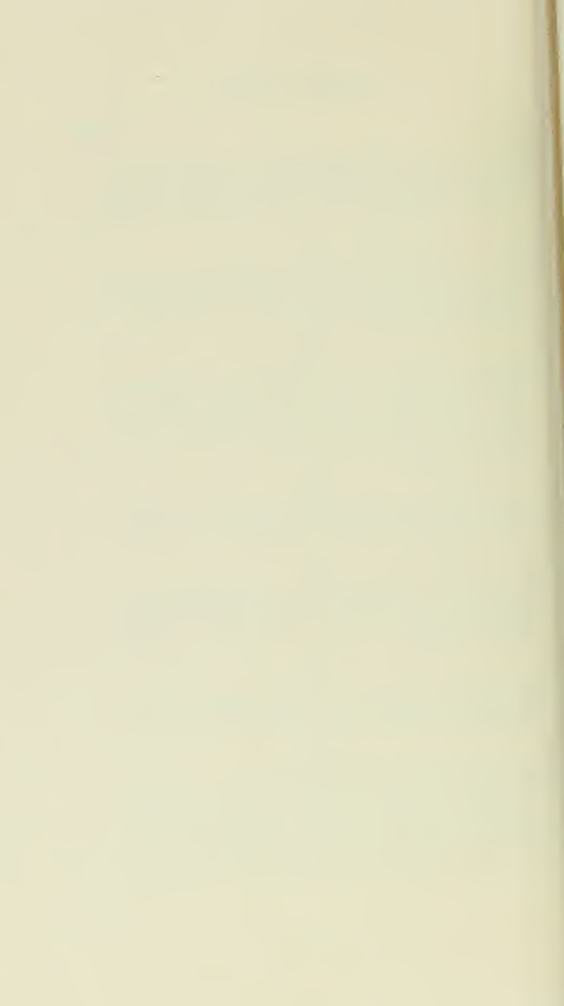
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Appellants present their Petition for Rehearing and
in support thereof respectfully show:

I

The decision as written involves an important question affecting the entire mining industry in the public land states

The decision, if permitted to stand, can have a disastrous effect upon the bona fide mining industry engaged in actually mining on unpatented mining claims located on the public domain. It applies to claims located for any locatable mineral-intrinsically valuable or otherwise, metallic or non-metallic. It would apply without regard to the good faith of the claimant.

It upholds the right of the United States to use judicial proceedings to wholly suspend bona fide actual mining and removal of mineral substances from within any unpatented mining claim in advance of a final administrative decision invalidating the claim and under procedural circumstances in which the mining claimant can have no right or opportunity to show the validity or probable validity of his claim in the judicial proceeding simply because the issue is pending for decision in an earlier filed administrative government mining claim contest in the Department of the Interior.

If the decision stands, the United States need only file a government contest against a claim in the land office and then, without the matter having proceeded to a final administrative decision of invalidity, or, in fact, without proceeding beyond the mere filing of the contest, the United States may seek and obtain an injunctive order, thereby suspending the actual mining operations or preventing the use of a reserve while the administrative proceedings move ponderously toward their final conclusion.

II

The effect of the decision is to deprive the claimant of an opportunity to be heard and violates principles of due process of law

A. A government contest complaint having been filed in the land office, that agency has exclusive jurisdiction of the subject of the validity of the claim. Under the decision, a subsequent application to a district court for injunctive relief pending the final administrative determination is made and must be acted upon in a vacuum in which the claimant can not be heard until

there has been rendered against him a final and effective decision in the land office. He is thus unable to present evidence of or to argue validity in the courts in opposition to the government's application for the injunction. This can not be due process of law.

B. The decision made no mention of the constitutional point although it was raised in written and oral argument by Appellants (App. Op. Br. pp. 11, 12 and 13; App. Cl. Br. pp. 7 and 8).

III

Application of the rule of the decision in the light of the marketability concept of valuable discovery will result in unreasonable and unlawful loss of property rights

A. The decision states that defendants argued orally but not in their briefs that the current marketability requirements of a valuable discovery would result in the loss of their claim when such an injunction is obtained. This overlooked the argument on pages 12 and 13 of Appellants' Opening Brief. There it was pointed out that the use of the injunctive power in such a case operates to forfeit the market of the miner.

B. The decision then goes on to state that a government-sought temporary injunction may not be permitted to prejudice a claimant's asserted rights in such a way. But this is of no comfort to a claimant who is actually forced out of a market or prevented from entering in or is adversely affected financially and thus is unable under the marketability rule to show a valuable discovery at the time his title and right are challenged by the government at the hearing in the land office.

C. The decision on this point completely overlooks the application of the marketability concept of a valuable discovery to support a mining claim to all claims and in every instance whether in opposition to a government contest or in opposition to a conflicting junior locator. The latter may freely enter, not being subject to the injunction and perhaps not even knowing of it, and can locate a conflicting claim and can readily show in successful private litigation with the contestee that the contestee had no "marketability" (no valuable discovery) was in fact not operating, and had either lost his market or was out of it at the time of the later location. The "property right" of the first claimant would thus be a myth, reduced to that by the injunctive relief granted the government.

D. The land office itself determines validity as of the time of its hearing on such contests, and a marketability developed during agency appeals will be considered cause for a setting aside of a preliminary and ineffective examiner's or other agency decision so that evidence of the qualification can be put in the record. This administrative construction should not be overlooked.

IV

The decision ignores the right granted by the general mining law in 30 U.S.C. 22

A. The statute (30 U.S.C. 22) make all valuable mineral deposits in lands belonging to the United States free and open to exploration and purchase and the lands in which they are found to occupation and purchase

by citizens. This is the statute that authorizes the location of mining claims in the manner provided by subsequent provisions of the general mining law.

B. The marketability concept of valuable discovery requires a show of profitability, a status to be achieved in most cases only in something considerably more than a moment or a day.

C. Attainment of marketability can be stopped by the government by the application of the rule of the decision, before the claimant has had an opportunity to "make the grade" and attain a condition of profitable marketability for the mineral. This seems to be clearly contrary to the intent of the general mining law.

V

The decision misinterprets the cited Northern Pacific Ry. Co. v. McComas and Kennedy v. United States decisions

The *McComas* case simply held that in litigation between private parties, relating to possessory rights in public land, where the matter of the disposal of the title was pending in the land office, the court nevertheless have jurisdiction to protect a possession lawfully acquired or to restore one wrongfully interrupted. The government was not a party to the *McComas* case and the controversy was between private conflicting claimants.

Kennedy held that when the government elected to proceed in the courts rather than for administrative relief, there was jurisdiction in the court.

Here the government elected to follow the administrative route. *McComas* presupposed a determination would and should be made by the court as to whether the possession sought to be protected was lawfully acquired or whether one had been wrongfully interrupted in his possession. In this case the decision is that the courts have no jurisdiction to determine right or wrong as far as possession is concerned and must blindly enjoin mining merely because of the pendency of the administrative proceedings or an examiner's preliminary and wholly ineffective decision against a contestee.

VI

The decision converts the "holding hand" rule into a means for denial of due process of law

Where the United States has elected to proceed in the land office, the court must hold its hand. The decision here is to the effect that in such cases the courts may not examine into the title (for it is clearly in the United States) nor into the right of possession (which is essentially the mining claimant's right under the general mining law) for that is pending in the land office. Under the decision, therefore, there is no showing a mining claimant can make to successfully oppose an application by the government for an injunctive order pending the final outcome of the administrative proceedings.

VII

The decision places the United States in a position in which by merely electing to go into the department first it can deny the claimant the use of his claim pending a final agency decision

Under *Kennedy* it was clear that if the United States proceeded first in the courts, the courts had jurisdiction to afford relief.

By the simple device, made available under this decision, of *electing* to proceed first in the land office, the United States thereby elects to deprive the claimant of any opportunity of showing the validity or probable validity of his claim, and thereby elects to deny the claimant the use of his claim under the general mining laws for the slowly passing years while the administrative proceedings drag on to their ultimate final decision.

Wherefore, Appellants petition for a rehearing.

Dated January 8, 1969.

JOHN B. LONERGAN and
LONERGAN, JORDAN & GRESHAM,
By JOHN B. LONERGAN,
Attorneys for Appellants.

Certificate.

I hereby certify that in my judgment the petition for rehearing is well founded and further certify that it is not interposed for delay.

JOHN B. LONERGAN